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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY AP  
DEPUTY

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W. BRANDT BEDE AND LESLIE K. MCLAUGHLIN BEDE,

APPELLANTS

V.

DARYL W. YOREK AND KELLY M. YOREK,

RESPONDENTS

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RESPONDENTS' OPENING BRIEF

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pm 12/15/15

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## **I. Standard of Review**

1. "When a trial court has weighed the evidence . . . , appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law." Heqwine v. Lonqview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).
2. "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." Lewis v. Dep't of Licensing, 157 Wn. 2d 466, 468, 139 P.3d 1078 (2006).
3. Whether the elements of a prescriptive easement are met is a mixed question of law and fact. Lee v. Lozier, 88 Wn.App. 176, 181, 945 P.2d 214 (1997). Whether the facts found by the trial court and supported by the record establish a prescriptive easement is reviewed for errors of law. Id.
4. The statute under which a party can recover damages is a question of statutory interpretation, which the court reviews de novo. Pendergrast v. Matichuk, 355 P 3d. 1210, 1219 (Wash. App. 2015).

## **II. Statement of the Case**

The parties have lived next to each other in a high-end Tacoma neighborhood for over two decades. They both have large, beautiful homes which they greatly value. Bedes and Yoreks have a shared driveway which meanders over the parties' common property line. The driveway existed and had been used since the 1920s. Entering the driveway, the common property line is more on the Yoreks' side. At the end of the common driveway, the common property line is more on the Bedes' side. There is no easement of record.

In 2012, over a series of months, Dr. Bede removed a mature hedge which was over four feet tall. Each time he trespassed on Yoreks' property. Replacing the hedge was impossible because a nursery could provide only young plants in five-gallon pots, which would take decades to grow. Yoreks hired a surveyor to mark the property line. With the help of professional contractor, in the same area where the hedge had been, Yoreks installed a six-foot, prefabricated, earth-tone colored fence, decorated with brick fascia. The fence was installed inside Yoreks' property line based on the surveyor's markings. The fence provided a screen between the two properties.

The following year, Bedes and Yoreks sued each other to quiet title in a driveway easement. Yoreks sought a prescriptive easement from the point of the property line, near the point of a brass survey marker, to the end of the concrete fence, straight across to the curb line. Under a spite fence theory, Bedes sought an injunction for removal of the fence. Yoreks also counterclaimed for trespass, waste, seeking a money judgment and recovery of attorneys fees. CP 14-19.

After Bedes' case-in-chief, the trial court dismissed Bedes' spite fence claim. Order Granting Motion for Dismissal for Spite Fence Claim, entered 6/5/15. CP 118-121.

The trial court was presented the issue of determining the actual parameters of the prescriptive easement, and which party gets the benefit of the easement. It granted Yoreks' cause of action, recognizing their prescriptive easement. The court entered Judgment on 6/5/15, CP 125-135, and an Order Granting Attorney Fees and Costs, also entered 6/5/15, CP 122-124, awarding Yoreks, as prevailing party, attorney fees in the amount of \$7990.75 and costs in the amount of \$551.00, under RCW 4.24.630. CP 125-135; RP 4/16/15 at 9:16-18. It entered Findings of Fact and Conclusions of Law on 6/12/15. CP 136-152.

Bedes appealed. Yoreks respectfully request that the Court affirm the trial court's orders on appeal.

### **III. Argument**

#### **A. The Trial Court Properly Found Bedes Liable for Waste, Awarded Yoreks a Prescriptive Easement in the Driveway Area and entered Judgment in their Favor**

##### **1. The Evidence Supports Yoreks' Claim for Waste**

Dr. Bede removed the hedge in increments, though there was a factual dispute as to whether he started in January or March 2012. RP 4/14/15 at 47 and RP 4/15/15 at 44. Kelly Yorek was reluctant to broach the subject with Dr. Bede: "I remember being more just intimidated and afraid. I've always been really reluctant to engage in a conversation with Dr. Bede because it never ends well. It's not constructive, so I usually avoid it." *Id.* He removed the majority of the hedge while Yoreks were out of town in May 2012. RP 4/15/15 at 45. Dr. Bede removed it because, in his opinion, "it was a real eyesore for us, and we have a very beautiful yard." RP 4/14/15 at 40:24 and 41:1-3.

Bedes removed it even though the property line was visibly indicated by a surveyor rebar located in the vicinity of the hedge. They did not contest that they knew about the property line marking, which was indicated by a survey rebar located in the vicinity of the hedge. CP 136-152, Finding of Fact 1.36. Nor did Bedes contest that the inside of the

Wilkerson sandstone curbing, bordering Yoreks property and the common driveway, belonged to the Yoreks. CP 139, Finding of Fact 1.17. Dr. Bede also dug up and removed the roots and stumps of the hedge, thereby leaving behind holes in the ground (RP 4/15/15 at 41) and destroying reliable evidence to show where the hedge had been growing in relation to the property line. The court found that the hedge, including its root base and stems, belonged to Yoreks,. CP 139, Findings of Fact 1.17 and 1.18.

## **2. Yoreks Established the Elements of Prescriptive Easement**

To establish a prescriptive easement, the claimant must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner; (2) the use was "continuous" or "uninterrupted"; (3) the use occurred over "a uniform route"; (4) the use was "adverse" to the landowner"; and (5) the use occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." Gamboa v. Clark, 348 P. 3d 214, 183 Wn. 2d 38, 44 (Wash 2015) (citation omitted).

The Findings of Fact and Conclusions of Law correctly addressed the elements of a prescriptive easement by adverse use:

(1) Yoreks used the land in an open and notorious manner. There is no argument that Yoreks' use of the area in dispute was done openly, not in secret or without knowledge of Bedes. This element is met.

(2) Yoreks' use was "continuous" or "uninterrupted". Again, Bedes never asserted that the minimum ten-year period of use is not met. Kelly Yorek testified, "My understanding is that the boxwood hedge has been there...decades and decades...probably 40-50 years." Id. Yoreks lived in their property continuously for over 20 years and raised their three children there. RP 4/15/15 at 14-15 and 29. Further, there was privity between Yoreks and the prior owner: when there is privity between successive occupants, the successive periods of adverse use may be tacked to each other to compute the prescriptive period. Roy v. Cunningham, 46 Wn.App. 409, 413-14, 731 P.2d 526 (1986). This element is met.

(3) Yoreks' use occurred over "a uniform route". The "uniform route" element cannot be easily applied to the facts here because there is no pathway, route or thoroughfare. The easement area in question was occupied primarily by plants. The hedge was never repositioned or transplanted. The facts support a case for "uniform placement" rather than "uniform route". This element is met.

(4) Yoreks' use was "adverse" to the landowner. "We generally interpret adverse use as meaning that the land use was without the landowner's permission." Gamboa, 183 Wn. 2d at 44. There was no express or implied permission to use the hedge and easement area. Our State Supreme Court determined there was sufficient evidence establishing

adverse use where the claimant extended the driveway to his own property, maintained the driveway, and used it to bring in materials and equipment to build his home and garage. Drake v. Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). Bedes' brief (at page 15) mischaracterizes the evidence, stating that Yoreks provided no testimony that they maintained the hedge. In fact, Kelly Yorek testified she did a lot of the hedge maintenance at her home, and that her son and gardener helped as well. RP 4/15/15 at 23:24-24:8. She testified that she redid the entire yard after they purchased the house. RP 4/15/15 at 21. Having been a member of the Tacoma Garden Club, she took much pride in her yard and her passion of gardening. RP 4/15/15 at 20. This element is met.

(5) Yoreks' use occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights". RP 4/15/15 at 30. Id. See (2) and (4) above. This element is clearly met.

### **3. The Prescriptive Easement Over the Mutual Driveway Property Extends to the Cedar Tree**

It is undisputed that the parties share a common driveway. The driveway access should extend to its natural ending point just beyond the boundaries of the pavement. As the court found, the prescriptive easement should extend to the cedar tree.

The Court should affirm the trial court's order finding a prescriptive easement, waste and judgment in Yoreks' favor.

**B. Attorneys Fees were Properly Awarded to Yoreks as Prevailing Party Under RCW 4.24.630**

**1. Yoreks Plead RCW 4.24.630**

Yoreks plead and cited to the RCW 4.24.630, the "Waste Statute", at every juncture of the case. RCW 64.12.030 was plead in the alternative. Defendants' Answer and Counterclaim, CP 18; Defendants' Trial Brief, CP 24-38; Defendants' Motion for Attorney Fees and Costs, CP 46-60.

**2. RCW 4.24.630 Applies**

RCW 4.24.630 provides:

- (1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or **wrongfully injures personal property or improvements to real estate on the land**, is liable to the injured party **for treble the amount of the damages caused by the removal, waste, or injury**. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. **Damages recoverable under this section include**, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including **the costs of restoration**. In addition, the person is liable for reimbursing **the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.** (emphasis added)

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.30....

Breaking down the highlighted language in section (1) above, two issues emerge: first, whether the injury to property was “wrongful”; second, what damages are recoverable. The trial court found a “wrongful” injury to Yoreks’ property. “The Bedes intentionally entered onto the Yoreks’ real property and cut and removed the Yoreks’ hedge, without authorization from the Yoreks and as a result the Yoreks’ damages shall be trebled in accordance with RCW 4.24.630.” Finding of Fact 2.8, CP 144. Next, Yoreks ask the Court to focus on the recoverable damages permitted under the Waste Statute: they sought damages for the costs of restoration, which was the cost of installation of the fence, a total of \$1123.50, which was trebled. RP 4/15/15 at 43; Judgment, CP 129. The Waste Statute, and not the Timber Trespass Statute, applies because Yoreks’ sought *restoration* costs as damages, not *replacement value* of the hedge.

The facts reflect wrongful act and recoverable damages which fit squarely within the parameters of the Waste Statute.

### 3. **RCW 64.12.030 is Inapplicable**

RCW 64.12.030, the “Timber Trespass” Statute, provides:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing it.

Because the Timber Trespass statute is penal, and not merely remedial, courts strictly construe it. Pendergrast, 355 P. 3d at 1219.

Bedes' argument that the Timber Trespass Statute must apply under RCW 4.24.630(2) should be rejected. The Timber Trespass Statute is not applicable because it applies to the cutting of merchantable shrubs or trees:

The timber trespass statute has three purposes: (1) to punish a voluntary offender, (2) "to provide, by trebling the actual present damages, a rough measure for future damages," and (3) "[t]o discourage persons from carelessly or intentionally removing another's **merchantable shrubs or trees** on the gamble that the enterprise will be profitable if actual damages only are incurred. (emphasis added).

Pendergrast, 355 P. 3d at 1210, citing Guay v. Wash. Nat. Gas Co. 62 Wn. 2d 473, 476, 383 P.2d 296 (1963). Guay has been good law for 52 years. Pendergrast is clear judicial direction that the Timber Trespass Statute is designed to address acts of destruction or conversion of "merchantable shrubs or trees", that is, with resale value. Conversely, it does not to apply to a removal of a neighbor's residential shrubbery, as in the present case.

Here, beyond the value of the hedge, there was evidence of damages awarded related to waste or damage to the land. The trial court found “injury to the Yoreks’ real property and improvements”. Finding of Fact 2.7, CP 144. Damages were awarded for mitigation by the cost of installing the fence, not for the replacement value of the hedge, as in Pendergrast. Finding of Fact 1.38 and 1.40, CP 142 and 143.

Pendergrast is consistent with another recent case, Gunn v. Reily, 344 P.2d 1225, 185 Wn. App 517 (Wash. App. 2015) which is also distinguishable. In Gunn, Reilys directed their agent to cut 107 of Gunns’ trees to make room for equipment which Reily needed to build a well. Applying the Timber Trespass Statute, damages were awarded for the value and cleanup of the cut trees, surveying costs related to the cut trees, court costs, and attorney fees. Gunn, 344 P.2d at 1230.

The facts of Pendergrast and Gunn are distinguishable. The Waste Trespass statute fits squarely within the facts.

### **C. The Trial Court Properly Dismissed Bedes' Spite Fence Claim**

Bedes argued that the fence erected by Yoreks constituted a spite fence. They sought relief under RCW 7.40.030 directing that the structure be removed. RCW 7.40.030 provides:

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure **intended to spite, injure or annoy an adjoining proprietor**. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal. (emphasis added)

After the Bedes' case-in-chief, the court granted Yoreks' motion under CR 41(b)(3) for an order dismissing this cause of action.

The facts in Baillargeon v. Press, 11 Wn. App 59, 521 P.2d 746 (1974) rev. den., 82 Wn. 1010 (1974) bear some similarity to the facts here and deserve analysis. Baillargeon cut down a large cedar tree close to the property line. Defendant Press mistakenly thought the cedar tree was situated on his own property. In reaction, Press constructed a 6-foot-high grape stake fence above a concrete block rockery adjacent to the property line. As well, Press extended the fence at the front of the properties. Baillargeon sought removal of the fence under RCW 7.40.030. The trial court found it was necessary for Press to install the fence in order to fill the gap left from the cedar tree.

Baillargeon set forth three elements for a spite fence claim:

We conclude that in order to apply the spite fence statute, RCW 7.40.030, to restrain the erection of a fence or other structure or to abate an existing structure, the court must find (1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose.

Baillargeon, 11 Wn. App. at 66. In McInnes v. Kennell, 47 Wash. 2d 29, 35, 286 P.2d 713, 716 (1955), an owner of waterfront tried to compel his neighbor to deconstruct a pier and fences which were erected along the boundary line between the properties. The appellate court refused to apply RCW 7.40.030 because there was no malevolence of purpose or malicious motive or intent in erecting the pier and fences. See also Jones v. Williams, 56 Wn. 588, 594, 106 P. 166 (1910) (construction of a garage did not violate the spite structure statute because the garage served a useful purpose).

The trial court appropriately addressed the Baillargeon elements:

**1. The Structure does not Significantly Damage Bedes' Enjoyment of their Property**

Bedes failed to satisfy the first element to show that the fence damaged enjoyment of their property in "some significant degree". The

trial court found that the “structure that was erected does not cause significant damages to [Bedes] enjoyment of this property.” RP 4/15/15 at 8. The court later found: “[T]his is a reasonable fence. The fact that they [Yoreks] put the good side facing in for them to look at does not make this a spite fence.” RP 4/15/15 at 9:25 to 10:2.

Dr. Bede testified that his main concern was that the fence was a visual obstruction which made the process of backing his trailer hauling his boats into his driveway less convenient. RP 4/14/15 at 28 and 32. But when asked why he did not mitigate the issue by installing a concave mirror at his driveway that would allow him to see into the driveway to avoid any impediments, he said it that would be “aesthetically unpleasing.” RP 4/14/15 at 102-03. Other than the parties’ testimony, Bedes offered no evidence of actual property damage or actual dangerous condition created by the fence. Bedes presented no expert evidence from a safety or road engineer that the structure created a dangerous condition. While it may be practical for Bedes to park two recreational boats and trailer on their residential property, it is not required for enjoyment, and Bedes could have rented space elsewhere for this purpose.

## **2. The Structure Serves a Useful or Reasonable Purpose**

The trial court found that Bedes had not proved the third element, that the fence lacked a useful and reasonable purpose. RP 4/15/15 at 6.

“[T]he fence does serve a useful and reasonable purpose.” 4/15/15 at 6:23-24.

The trial court found that the fence serves three useful and reasonable purposes, not based in malice or spite. First, it provides a screen from the Bedes’ boat and blue tarp, situated on Bedes’ property, which were visible without the screen in place: the court remarked, “A lot of people would consider vehicles with blue tarps over them to be extremely tacky and offensive, and would want to block that view.” RP 4/15/15 at 10:17-19.

Second, as in Baillargeon, the fence restored and filled the space left bare by removal of the hedge.

Third, the fence actually mitigated the damage caused by Bedes: “The Yoreks mitigated their trespass and waste damages by installing a concrete fence, as they had no reasonable means to replace the mature boxwood hedge with a hedge of similar height and density. Finding of Fact 138, CP 142. Replacement of a boxwood hedge of like kind, height, and density would have cost more than the installation of the fence.” Finding of Fact 138, CP 142.

The trial court concluded: “There isn’t enough evidence to show that this simply to be a spite fence...[i]t’s a question of aesthetics.” RP


4/15/15 at 11:22-24. Bedes failed to meet their burden of proof to establish all three elements to support spite fence claim.

#### **IV. Conclusion**

The Court may be guided by the principles upon which RCW 7.40.030 is based, as articulated in Baillargeon: “Rights of adjoining landowners in the use and enjoyment of their property are relative, but they are also equal. Equity cannot restrict one landowner to confer a benefit on the other. It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of another in the reasonable use and enjoyment of his land that equity will intervene.” Baillargeon, 11 Wash. App at 66. The irony here is that Bedes deliberately and without justification damaged Yoreks’ property which had served as a natural screen between the two properties. When Yoreks reacted by installing a fence, Bedes complained they disliked it, and sought judicial intervention to remove it. The equities clearly lie with the Yoreks. Awarding Yoreks a prescriptive easement mirrors these equities.

The Court is asked to affirm all three orders on appeal.

Respectfully submitted this 14<sup>th</sup> day of December 2015.

  
Deirdre Glynn Levin  
WSBA No. #24226  
Attorney for Respondents

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**V. Certificate of Service**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am not and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing REPONDENTS' BRIEF on MARK R. ROBERTS, Roberts Johns & Hemphill, PLLC, 7525 Pioneer Way, Suite 202, Gig Harbor, WA, 98335, VIA email and VIA US Mail.

Signed this 14<sup>th</sup> day of December, 2015 at Seattle, Washington.

  
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Deirdre Glynn Levin